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SHORTER ARTICLE

"CONSTRUCTION" AND RECTIFICATION AFTER *CHARTBROOK*

RICHARD BUXTON*

Once the fundamental change that has come over the law on construction of contracts since the observations of Lord Wilberforce in *Prenn* v. *Simmonds*[1] and *Reardon Smith* v. *Yngvar Hansen-Tangen*[2] had been sufficiently appreciated,[3] "construction" and rectification, the two weapons available to the courts to deal with written agreements that do not reflect the contract that the parties intended to make, have lived in uneasy parallel with each other. Although the two institutions serve the same forensic purpose they purport to perform quite different tasks, the most striking difference between them being that evidence of prior negotiations is inadmissible when the disappointed party seeks to construe the defective document in terms different from those stated on its face; but such evidence is admissible, indeed has been seen as the most relevant evidence of all,[4] when the disappointed party, not having succeeded in having the document construed to his liking, seeks instead to have the document rectified by the court.

The strict rule of inadmissibility of evidence of prior negotiations when construing a written contract produces a practical paradox, because when the contractual writing is disputed all but the most negligent of counsel will have pleaded rectification of the writing as well as the construction of the writing that best suits his clients' interests; and therefore the evidence forbidden in the exercise of construction will be before the court in any event. The court, in construing a document in any particular case, can be expected to note that evidence but then put it out of its mind.[5] But the concurrent existence of a set of inconsistent rules calls for reflection on two separate branches of contractual

* Formerly a Lord Justice of Appeal.
[1] [1971] 1 W.L.R. 1381.
[2] [1976] 1 W.L.R. 989.
[3] To quote Lord Hoffmann in *Investors Compensation Scheme* v. *West Bromwich BS* [*ICS*] [1998] 1 W.L.R. 896, at p 912 F.
[4] Baroness Hale of Richmond in *Chartbrook Ltd* v. *Persimmon Homes Ltd* [*Chartbrook*] [2009] UKHL 38, [2009] 1 A.C. 1101, [100].
[5] As did Baroness Hale of Richmond in *Chartbrook*, on which see paragraph 99 of the report.

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jurisprudence that however coexist in most cases. That can be best done in the context of the most recent and authoritative survey of both construction and rectification, by the House of Lords in *Chartbrook*. Before that, however, something more must be said about the underlying law of construction and of rectification.

Construction: the Hoffmann principles

Rarely has what was presented as merely a statement of orthodox doctrine[6] so completely captured an area of the law as have Lord Hoffmann's five principles set out in *ICS*.[7] The author of a magisterial work on construction of contracts speaks only partly ironically when, having introduced the Hoffmann principles, he suggests that the lazy reader may stop there.[8] However, the passage of twelve years, and the stimulus of further guidance from Lord Hoffmann himself in *Chartbrook*, justifies some further analysis of the basic text.

The controverted question of whether *ICS* introduced anything new into the law[9] can be resolved as follows. Apart possibly from some overstatement in the requirement in principle 2 that "absolutely anything" affecting the understanding of the reasonable man must be taken into account, the first three of the principles are indeed a statement of the orthodox approach to construction, as set out previously by Lord Wilberforce, that the meaning of a document is what it would convey to an objective observer looking at the document against the matrix of fact in which the parties agreed that document. Thus, where there was doubt as to whose "profits" an agreement was referring to, the matrix of fact showed that what was meant was the consolidated profits of the group, and not just the profits of the parent company;[10] and the matrix of fact (including, especially, other terms of the contract) showed that a reference in a shipbuilding contract to "Yard 354" was merely a means of identifying the vessel in question, and not part of the description of the goods.[11] It is in the second part of principle 4, and in principle 5, that a new approach is introduced.[12]

Although anyone sufficiently interested in the subject to look at this article will be able to recite those principles off by heart, they are not

[6] The editor of the Law Reports reasonably took that assurance at face value, and placed the case only in Volume One of the Weekly Law Reports.
[7] [1998] 1 W.L.R. at 912H-913E.
[8] Sir Kim Lewison, *The Construction of Contracts* 4th ed, (London 2007), p 3.
[9] The extensive judicial observations on that issue are fully surveyed in Lewison, *op. cit*., paragraph 1.02.
[10] *Prenn* v. *Simmonds*, [1971] 1 W.L.R. at p 1388.
[11] *Reardon Smith*, [1976] 1 W.L.R. at p 998.
[12] As Lord Hoffmann himself implicitly recognised when, in paragraph 37 of his speech in *Chartbrook*, he stressed the otherwise uncontroversial nature of the *ICS* principles.

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susceptible of easy summary, and it will be prudent to set them out verbatim:

(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of a document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meaning of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax: see *Mannai Investments Co. Ltd.* v. *Eagle Star Life Assurance Co. Ltd.* [1997] A.C. 749.

(5) The "rule" that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had.[13]

And *Chartbrook* underlines the particular nature of the fifth *ICS* principle. The condition for diverting from the natural and ordinary meaning, that something must have gone wrong with the language, is singled out as an explanation of the jurisprudence of *ICS* in paragraph 14 of the speeches in *Chartbrook*, and is reverted to in paragraph 25, where it is said that all that is required for verbal rearrangement or correction is that it should be clear that something has gone wrong with the language and that it should be clear what a reasonable person would have understood the parties to have meant.

That formulation, we may think, would have come as a surprise to Lord Wilberforce, at least if seriously suggested as justified by the two cases of his that are cited in its support. Whatever the nature of the process in *ICS*, it is clear that it is not one of construing the meaning of the document. Take the two leading examples of the process referred to in paragraph 21 of *Chartbrook*. "13th January" does not mean 12th January [*Mannai Investment* v. *Eagle Star*[14]]; and, however roughly its analysis was subsequently handled by the House of Lords, the Court of Appeal was, with respect, clearly right in *ICS* itself to say that "any claim (whether sounding in rescission for undue influence or otherwise)" does not mean any claim sounding in rescission (whether

[13] *ICS* [1998] 1 W.L.R. at p 913 B-D.
[14] [1997] A.C.749.

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for undue influence or otherwise).[15] That objection is sought to be met by saying, at the start of *ICS* principle 4, that the meaning of a document is not the meaning of its words, but what the parties using those words would reasonably have been understood to mean. But that is plainly not so. The whole point of drawing up a document, and in particular a contractual agreement, is so that the legally binding obligation of the parties can be found in that document; which being a document can only speak through the words used in it. When something has gone wrong with the language used in the document, that shows that the parties did not succeed in giving the document the meaning that they intended. That meaning may be found elsewhere but, precisely because the language of the document that purports to express that meaning has gone wrong, it cannot be found in the document.

Principle 5 was thus revolutionary because it overrode the previous understanding that, rectification apart, the court could not depart from the words of the document to find an agreement different from that stated in the document. That understanding was shortly expressed by Lord Simon of Glaisdale in *L. Schuler A.G.*v. *Wickman Machine Tools*[16]:

> [The general principle of law] has been frequently stated, but it is most pungently expressed in *Norton on Deeds* (1906), p. 43, though it applies to all written instruments:
>
> > '…the question to be answered always is, 'What is the meaning of what the parties have said?' not 'What did the parties mean to say?'…it being a presumption juris et de jure…that the parties intended to say that which they have said.'
>
> It is, of course, always open to a party to claim rectification of an instrument which has failed to express the common intention of the parties; but, so long as the instrument remains unrectified, the rule of construction is as stated by *Norton*. It is, indeed, the only workable rule.

Principle 5 in *ICS* starkly departs from that guidance, by confusing the meaning of what the parties said in their document with what they meant to say but did not say; and substitutes for the meaning of the document an intention of the parties that was not manifested in or by

[15] In paragraph 22 of *Chartbrook* support appears also to be sought from the observation of Brightman L.J. in *East* v. *Pantiles (Plant Hire) Ltd* [1982] 2 E.G.L.R. 111 at 112, there set out. But while Brightman L.J., read in abstraction from the case itself, appears to speak generally of correcting mistakes on the face of the instrument, he was addressing what was claimed to be, but found by the Court of Appeal not to have been, a clerical error. Whether there had indeed been a clerical error was determined entirely from looking at other clauses in the lease. Lord Brightman might have been surprised to be told that during that exercise he was not only entitled but also obliged to have regard to absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.

[16] [1974] A.C. 235 at p 263.

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the document. Accordingly, when principle 5 of *ICS* is applied the necessary albeit unstated assumption is that the parties had reached a consensus which they then, either out of choice or because the law requires them to do so, expressed in a written document. It is that document that was and was intended to be "the agreement" between them; but, because something has gone wrong with the language of the document the agreement that it contains does not reflect the parties' consensus. *ICS* addresses that difficulty by reading the agreement so that it does reflect the consensus, but with the agreement as so construed remaining the instrument that binds the parties. But in reality, even though not in form, what is thereafter enforced is the original consensus, and not the written agreement that purported, wrongly, to set out that consensus.

So to say is of course heretical. Contract lawyers think it necessary to assert, however implausibly, that the process is of construction of the written agreement rather than enforcement of the, different, preceding consensus: first, because the document is where the parties have decided their agreement is to be found; and second, in some cases the law in any event requires construction of the document, because either the vestiges of the parole evidence rule[17] or statutory provisions such as the Law of Property (Miscellaneous Provisions) Act 1989 say that a written agreement, but nothing else, is enforceable.

The dependence of the *ICS* jurisprudence on elucidation and then enforcement of a prior consensus does, however, underline the very close relationship of the effect, even if not of the form, of that jurisprudence to the institution of rectification.

Rectification: the objective test

Recent editions of *Chitty*[18] have set out as the essence of rectification a statement by an uncommonly distinguished constitution of the Court of Appeal[19] in *The Nai Genova*:[20]

> the remedy of rectification is one permitted by the Court, not for the purpose of altering the terms of an agreement entered into between two or more parties, but for that of correcting a written instrument which, by a mistake in verbal expression, does not accurately reflect their true agreement.

A closer expression of the process necessarily envisaged by principle 5 of *ICS* could scarcely be found. And *Chartbrook* underlines that

[17] As pointed out by Professor McLauchlan, (2010) 126 L.Q.R. at p 10, lately given a new lease of life by the emphasis placed in *Chartbrook* by both Lord Hope of Craighead and Lord Hoffmann on *Inglis* v. *Buttery* (1878) LR 3 App. Cas. 552 HL.
[18] E.g. 30th edition (2009) at paragraph 5–107.
[19] Oliver, Slade and Robert Goff L.JJ.
[20] [1984] 1 Lloyds Reports 353 at p 359.

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commonality. At first instance and in the Court of Appeal the case was argued on the basis that for rectification the written agreement had to be erroneous in failing to reflect what both parties believed their prior consensus to have been. But in the House of Lords the appellants, encouraged by an article by Mr Marcus Smith,[21] argued that

> Rectification required a mistake about whether the written instrument correctly reflected the prior consensus, not whether it accorded with what the party in question believed that consensus to have been. In accordance with the general approach of English law, the terms of the prior consensus were what a reasonable observer would have understood them to be and not what one of the parties believed them to be.[22]

Since the House found in favour of the appellants in any event on the "construction" issue, there was no need to go on to consider rectification; and the point taken by the appellants on rectification was, as we have seen, first raised in the House of Lords. Neither of those considerations deterred the House from entering upon the argument, and holding that the law is as stated in the passage set out above.

When the reasonable observer is looking at the prior consensus not for the purpose of rectifying the subsequent written agreement but for the purpose of concluding that something must have gone wrong with the language of the subsequent written agreement he will in the latter case also be considering that consensus objectively understood. The one element that might have been thought to be missing from a complete overlap of *ICS* construction and rectification was thus authoritatively put in place by *Chartbrook*.

Evidence of previous negotiations

The issue in *Chartbrook* that was seen as most important by the court and by commentators was the reconsideration of the long-standing rule, recognised in *ICS* itself, that in issues of construction evidence of prior negotiations is inadmissible. To the disappointment of at least some,[23] the House confirmed the exclusionary rule, and in strong terms. The reasons given for that conclusion require some further comment.

[21] (2007) 123 L.Q.R. 116. The issue had also been considered, after the publication of Mr Smith's article, by Christopher Clarke J. in his, with respect, admirable judgment in *P.T. Berlin Laju Tanker TBK* v. *Nuse Shipping Ltd* [2008] EWHC 1330 (Comm); [2008] 2 Lloyd's Rep 246. The judge reached the same conclusion as Mr Smith without having the benefit of citation of the latter's article. The judgment, which examines the same authorities in the same terms as did the House of Lords in *Chartbrook*, was cited to the House, but not referred to in the speeches.

[22] To quote Lord Hoffmann's statement of the argument, at paragraph 57 of *Chartbrook*.

[23] First amongst them Professor McLauchlan in the note referred to in n 17 above, which draws on his earlier and, with respect, very valuable contributions to the subject. Of particular interest in the present context is Professor McLauchlan's powerful demonstration that most of the reasoning in support of the exclusionary rule by the same token undermines principle 5 in *ICS*.

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It might be thought irrational that what would seem to be the most cogent indication of what the document was intended to say is excluded from the obligation, imposed by principle 2 of *ICS*, to take into account absolutely anything that affects the way in which the language of the document would have been understood by a reasonable man. Principle 3 of *ICS* rationalises the contradiction between principle 2 and the rule excluding consideration of prior negotiations as follows:

> The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life.

Practical policy, fear of courts being overwhelmed by masses of irrelevant evidence, never seemed a convincing reason for making a special exception for evidence of prior negotiations. As Lord Nicholls of Birkenhead has pointed out,[24] in deciding other questions affecting commercial contracts, including the authority of the parties, estoppels, misrepresentation, and not least rectification, judges are already invited to read page after page of turgid pre-contract correspondence, a process that they may be expected to keep under control by proper case management. Accordingly, while practicality is still stressed in *Chartbrook*, emphasis is also placed on the need to uphold the English objective theory of contractual interpretation.[25] Lord Hoffmann explained the point as follows:

> pre-contractual negotiations seem to me capable of raising practical questions different from those created by other forms of background. Whereas the surrounding circumstances are, by definition, objective facts, which will usually be uncontroversial, statements in the course of pre-contractual negotiations will be drenched in subjectivity and may, if oral, be very much in dispute. It is often not easy to distinguish between those statements which (if they were made at all) merely reflect the aspirations or one or other of the parties and those which embody at least a provisional consensus which may throw light on the meaning of the contract which was eventually concluded.[26]

The practicalities of that objection may be thought to take a pessimistic view of the perception and case-management abilities of the judiciary, which Lord Nicholls of Birkenhead had seen as the means of avoiding uncertainty and chaos.[27] But a general and more fundamental objection

[24] (2005) 121 L.Q.R. at p 588.
[25] *Chartbrook*, at paragraph 33.
[26] Ibid, at paragraph 38.
[27] See the text at n 24 above.

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raised by Lord Hoffmann is that statements in pre-contractual negotiations will be "drenched in subjectivity", so that to look at them will undermine the court's obligation to construe the contract, and its background, in terms of the objective perception of the reasonable observer. That statement of the law, and for that reason, raises striking issues when one compares construction with rectification.

Construction and rectification: the future

Two issues stand out. First, although the process of construction under principle 5 of *ICS* is structurally the same as that of rectification, and addresses the same problem of mistaken or incompetent drafting, evidence of previous negotiations is admitted in rectification, but excluded, in carefully argued terms, in construction. No explanation or justification is advanced for this dissonance, either in *Chartbrook* or elsewhere, and the present writer has not succeeded in thinking of any. Second, whilst *Chartbrook* establishes that the prior consensus in an issue of rectification must be judged objectively, the case assumes that evidence of prior negotiations will continue to be admitted to determine that issue, although that evidence is seen as inherently subjective in nature, and for that reason excluded from principle 5 construction.

Baroness Hale of Richmond was the only member of the House to address the latter inconsistency. She suggested that what would be helpful in rectification was not evidence of prior negotiations, but only evidence of an objectively ascertained consensus achieved after those negotiations.[28] This solution, elegant as it is, was not the subject of any discussion either in argument or in the other speeches, and there are a series of difficulties about it. First, it makes it even more difficult to reconcile the law of rectification with the absolute ban on the admission of any evidence about either the course or the outcome of prior negotiations that is imposed by *ICS* and upheld in *Chartbrook*. Second, if Lord Hoffmann were right about the difficulty of distinguishing between expressions of aspiration and objective consensus[29] it would only be in a very few cases that the solution could be confidently adopted. Third, and more fundamentally, by limiting admissibility to the identification of consensus the solution effectively abolishes the rule that evidence of prior negotiations is admissible. That is because the enquiry in rectification is directed at finding whether there was a "true agreement", as we now know from *Chartbrook* to be objectively ascertained, in advance of the written document.[30] If all that the court can

[28] *Chartbrook* at paragraph 100.
[29] See the passage from paragraph 38 of *Chartbrook* cited at n 26 above.
[30] See *The Nai Genova* cited at n 20 above.

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look at is the fact that that outcome was fulfilled, the negotiations leading to that outcome are necessarily excluded.

Much is thus left in the air, not only with regard to the relationship between construction and rectification, but also within the jurisprudence of rectification itself. These serious questions were left unaddressed at least partly because the approach to rectification adopted by the House of Lords only came into the case at that level. The issue was no doubt fully and skilfully argued by counsel instructed before the House,[31] but to permit the introduction of fundamental issues only in the final tribunal deprives both the House and the advocates appearing before it of the benefit of the wisdom of the Court of Appeal, and of the reflection, professional as well as academic, on the wider implications of any change in the law that a judgment of that court may be expected to provoke. And, in particular, collateral but important issues, such as the overlap with construction and the rationale of the prior negotiation rule in rectification, are likely to go unconsidered when the case is concentrated on a discrete question abstracted from the law as a whole.[32]

Chartbrook would appear as a matter of form or theory to have settled the issue of the admissibility of evidence of prior negotiations in questions of construction, perhaps for something like the next thirty years.[33] However, the law in practice may turn out to produce a somewhat different effect. Although *ICS* continues to attract some advocates as a comfortable alternative to close analysis of the actual agreement, once the limits of principle 5, stressed in *Chartbrook*,[34] are recognised, it can be seen as occupying no ground distinct from that of rectification; but with the handicap, not enjoyed by rectification, that evidence of prior negotiations is not admissible. Accordingly, in cases that fall within the structure of principle 5 practitioners, and courts, are likely to find it more sensible to move directly to rectification. That should have the beneficial effect of focussing early attention on the issue left open by the House of Lords of what exactly is to be understood by "prior negotiations" in rectification. If that proves to

[31] See in particular the tribute to the argument paid by Baroness Hale of Richmond at paragraph 101 of *Chartbrook*.

[32] For extensive further complaints on this theme see Buxton (2009) 125 L.Q.R. 60. Baroness Hale of Richmond, at paragraph 101 of *Chartbrook*, saw it as the great strength of the common law that questions of great practical and theoretical importance in the law of contract were still open to debate and development. There are certainly some areas of the common law, such as tort or human rights, where justice requires the courts to be able to develope the law in the course of litigation. But the law of contract, which individuals and businessmen use to regulate their affairs in order to avoid litigation, should place a premium on certainty. Neither *ICS* nor *Chartbrook* achieve that end.

[33] A length of time of the order that elapsed between *Prenn* v. *Simmonds* and the reversion to the issue in *Chartbrook*. Lord Hope in paragraph 2 of *Chartbrook* pointed out that under the common law "every so often" fundamental rules should come under fresh scrutiny. He gave no indication that the fresh scrutiny brought to bear in *Chartbrook* had been in any way overdue.

[34] See paragraphs 14 and 25 in *Chartbrook*, referred to above.

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carry the meaning that was favoured by Baroness Hale of Richmond[35] rectification may come to be a somewhat different exercise from that which is presently understood. However, on any view of its reach rectification should in practice transcend its present status as a safety net[36] in cases where the inadmissibility of prior negotiations in issues of construction produces a conclusion that those negotiations show to be plainly wrong. Rectification should in future occupy the whole of the field when it is necessary to correct errors in the formal expression of a contractual consensus.

[35] See n. 28 above.
[36] The expression of Lord Hoffmann, *Chartbrook* at paragraph 41.

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